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# W.E.A. Credit Union v. Paula Pace : Brief of Appellant

Utah Supreme Court

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TIMOTHY W. BLACKBURN; Attorney for Respondent

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

W. E. A. CREDIT UNION, /

Plaintiff and  
Respondent, /

vs. /

Case No. 14551

PAULA PACE, /

Defendant and  
Appellant. /

BRIEF OF APPELLANT

Appeal from the Judgment of the  
District Court of Weber County  
Honorable John F. Wahlquist

THOMAS S. WILSON  
CLERK OF DISTRICT COURT  
LEGAL COUNSEL  
2417 Main Street  
Ogden, Utah 84401

Attorney for Respondent

TIMOTHY W. BLACKBURN, ESQ.  
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Ogden, Utah 84401

Attorney for Respondent

FILED

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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W. E. A. CREDIT UNION,	/	
Plaintiff and	/	
Respondent,	/	
vs.	/	Case No. 14561
PAULA PACE,	/	
Defendant and	/	
Appellant.	/	

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BRIEF OF APPELLANT

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STATEMENT OF THE KIND OF CASE

This was an action brought by the Respondent, who was the Plaintiff in the Lower Court on an Order To Show Cause, why the Court should not order the Appellant, who was the Defendant in the Lower Court, to deliver up to the Respondent property upon which the Respondent claimed to have a lien upon a secured transaction entered into which pledged security was allegedly signed by both the Appellant and her spouse. The present Complaint and Order To Show Cause before the Court being an action against the Appellant only and did not have joined with it the spouse of the Appellant.

#### DISPOSITION IN LOWER COURT

The Lower Court did grant to the Respondent the right to possession of the home furnishings of the Appellant without having joined in said cause of action the husband of the Appellant and without the granting of an opportunity to the Appellant to post surety or bond for continued possession of the furnishings of the home and without granting to Appellant the right of a Due Process trial.

#### RELIEF SOUGHT ON APPEAL

The Appellant seeks reversal of the granting by the Lower Court of an Order on Order To Show Cause, granting to the Respondent a right to immediate possession of the home furnishings of the Appellant, utilizing the contempt powers of a Lower District Court granting possession of the property of the Appellant to the Respondent prior to the right of a Due Process hearing and adjudication of the rights of the husband, who was not a party in the Lower Court, in affect, granting an action of replevin prior to adjudication and Judgment of a Due Process hearing and without opportunity to the Appellant for the posting of a bond and in any way protecting the property rights of the Appellant and her spouse prior to seizure by a Sheriff in Weber County under orders of the Lower Court.

### STATEMENT OF FACTS

The Appellant and her spouse, Rudolph Pace, entered into a Promissory Note and Security Agreement with the Respondent on April 9, 1974. (R-19). The Respondent brought suit against the Appellant only, not naming the husband of the Appellant in the Lower Court Complaint. (R-1)

The Respondent brought an Order to Show Cause seeking Summary Replevin of the home furnishings which was the property of both the Appellant and her husband. (R-33)

An Order was signed and issued by the Lower Court on April 1, 1976, directing the Sheriff of Weber County to take possession of the security, which was the property of both the Appellant and her husband, Rudolph Pace. Only the wife, namely the Appellant herein, was a party to the action in the Lower Court (R-31). The Writ of Replevin was issued on April 1, 1976, by the Clerk of the Lower Court, together with a Precipe for possession of the merchandise of the Appellant and her spouse, Rudolph Pace (R-32). The Court issued the Writ of Replevin prior to trial and without necessity of the posting of bond as required under Rule 64B of the Utah Rules of Civil Procedure, as amended 1953. (R-33)

The spouse of the Appellant had previously filed Bankruptcy in the United States District Court for the District of Utah,



Northern Division, on October 5, 1974, and was discharged in Bankruptcy on November 3, 1975, (R-14). The Respondent herein was a creditor scheduled in the Bankruptcy schedules of Rudolph Pace (R-14).

The manager and treasurer of the Respondent testified that the Security Agreement was in fact signed by the Appellant and her spouse, Rudolph Pace (R-44), and further testified that the Respondent knew of the Bankruptcy filed by the Appellant's spouse, Rudolph Pace; that inasmuch as the Respondent's filing "was invalid", no claim nor any attempt to obtain a Disclaimer, or to file an action for fraud, or any other legal action was taken by the Respondent in the Bankruptcy Court. The Respondent's witness further testified that the Appellant herein was released from the first Security Agreement and that the items that were on the first Security Agreement were added to the items which were evidenced in the second Agreement, and that the second Agreement was a re-write of the first Agreement and was written so that the security of Rudolph Pace could be added into the successive instrument, which was a secured instrument upon which the Respondent herein brought its action in the Lower Court. (R-46)

ARGUMENT

POINT I

HUSBAND CANNOT BE DEPRIVED OF HIS ESTATE WITHOUT  
DUE PROCESS OF LAW.

Rudolph S. Pace is the husband of the Appellant in the instant matter before this Court and was not a party-Defendant to the action in the Lower Court, and he will be referred to hereinafter as the "husband".

The Legislature of Utah, in whom the Constitution vests the exclusive right to enact law, has formerly declared in Section 68-3-1, Utah Code Annotated, as amended 1953, that:

The Common Law of England so far as it is not repugnant to or in conflict with the Constitution or laws of the United States, or the Constitution or laws of this State \*\*\* is hereby adopted, and shall be the rule of decision in all Courts of this State. (Emphasis supplied)

The Utah Supreme Court, in applying a substantially identical Wyoming Statute declared that "the Common Law of England" so referred to refers to that law as of the date of the Declaration of Independence on July 4, 1776. Johnson v. Union Pacific Coal Company, 28 Ut. 146; 76 P. 1089, 1091 to 1093.

There is, of course, nothing in the Utah Constitution or Statutes repugnant to an estate by the entirety, and an

estate by the entirety which includes the personal property of a husband and wife, existed under the Common Law and has been recognized in various statutes of the State of Utah as still an existing entity.

78-41-1, Utah Code Annotated, as amended in 1953, in making reference to possible Estates existing in the State of Utah, specifically refers to a tenancy by the entirety as a possible Estate which would be affected by the termination of a life estate in reference therein.

In setting forth the rules for determining the existence of a partnership and to the type of estates that may exist thereunder, the statutes state at 48-1-4(2), Utah Code Annotated, as amended in 1953, the affect of particular statutes as to a tenancy by the entireties.

The alleged secured agreement under which the Respondent sought and obtained a Writ of Replevin in the Lower Court, as attached to Plaintiff's Complaint (R-2), was signed by both the Appellant and the husband, and was a re-write of a Security Agreement entered into November 1, 1973, which was an instrument drafted prior to the one upon which the Writ of Replevin was based (R-46), and in accordance with the testimony of the Respondent's only witness, was subscribed to by both the Appellant and her husband in order to release the furniture as collateral on the

first loan and adding in the items set forth in the second secured agreement, plus a substantial additional amount of the home furnishings of the husband, was intended as a release of the furniture as collateral on the first loan as testified to by Respondent's witness (R-46).

The husband had previous to any prior action filed a Petition in Bankruptcy and had been discharged at the time of the action in the Lower Court (R-14). The Respondent testified that it did not file a claim nor seek to sustain its lien in the Bankruptcy Court as against the husband, in that:

I discovered at the hearing in Bankruptcy, that another finance company had a prior lien on the subject furniture and that our filing was invalid.  
(R-45)

There was, therefore, no claim of any kind made before the Bankruptcy Court, either in allegation of a valid lien as to the Respondent or her spouse nor an allegation as to any fraud on the part of the husband or in regards to the alleged secured loan held by the Respondent, wherein the household furnishings of the Appellant and her husband was supposedly security for a loan, in that the Respondent believed it could not maintain a valid action of any kind in the Bankruptcy Court, and, therefore, avoided any confrontation as to its allegations of a secured loan or security at the time of the filing of

a Petition in Bankruptcy by the husband. (R-45)

There was no transfer of any estate as between the husband and wife and the estate of the husband and wife was an estate wherein each of the parties had an interest in the whole of the tenancy and common ownership in their household furnishings and was in the nature of an estate in personalty by the entirety.

A Common Law conveyance of property required a transfer of title and the granting of the lien against the personal property of the Appellant and her husband by reason of a secured transaction created in the Respondent at most an "equitable" or "lien" upon said property. Title to the property remained in the lienors and not in the Respondent.

The State of Utah has consistently held in regards to real property mortgages, that Utah is an "equitable" or "lien theory" State and not that of a "title theory". (See Thompson v. Cheasman, 15 Ut. 43, 48 P. 477; Bybee v. Stuart, 159 P.2d 118 (1948).

At 27 A.L.R. 826, definition of a marital estate and the nature of it is set forth as follows:

An estate of the entirety exists only between husband and wife, being an outgrowth of the marital relation based upon the theory of the legal unity of the two; it is, however, a unit of indivisible parts vesting in two distinct persons (husband and wife), who are, however,

regarded in law as one and the same. In this regard, the estate differs from a joint tenancy. Because of the indivisibility of the estate and the fact that it vests absolutely in the survivor, a very serious question has been presented as to whether or not any portion of the estate may be subjected to the payment of the individual debts of one of the spouses.

An estate by the entirety is a form of co-ownership in real and personal property held by husband and wife with right of survivorship. Its essential characteristic is that each spouse is seized per tout et non per my; that is of the whole or one of the entirety and not of a share, moiety, or divisible part as was defined in Gasner v. Pierce, 286 Pa. 529, 134 A. 494; C.I.T. Corporation v. Flint, 333 Pa. 350, 5 A.2d 126.

It is, therefore, submitted that the act of the Respondent in bringing an action against the Appellant only, without including the husband in said action, could not destroy the interest of the husband in the household furnishings and no possession of the collateral of the property, which was the property as much that of the husband as of the Appellant, could be achieved and perfected without the husband being a party to such action.

It was held in Louis Licker, et ux, v. Gluskin, 164 N.E. 613, by the Massachusetts Supreme Judicial Court, that the Common Law rights and disabilities of both husband and wife attach to the interest and title of each arising under

a tenancy by the entirety, and that the tenancy of the husband and wife in the entirety is essentially a tenancy modified by the Common Law theory of unity of husband and wife, in that they do not take by moieties, but by entireties. The Court further held that the characteristic of a tenancy by the entireties at Common Law continues unaffected by the modern statutes designed to ameliorate the rights of married women at Common Law and to render more flexible and individual the property rights of husband and wife. The Court further held:

That these indubitable Common Law rules require the conclusion, that a creditor cannot do with the right of a tenant by the entirety that which the tenant cannot do.

## POINT II

THE RIGHT OF THE BANKRUPT'S SPOUSE IS PROTECTED BY THE SUPREMACY OF THE BANKRUPTCY ACT OVER THE LAWS OF A STATE.

The Bankruptcy Act was created by Congress and the Bankruptcy Act specifically sets forth in 11 U.S.C., Section 11, jurisdiction and creation of Courts of Bankruptcy by stating:

The Courts of the United States hereinbefore defined as Courts of Bankruptcy are hereby created Courts of Bankruptcy and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction and proceedings under this Act, in vacation, in chambers, and during the respective terms, as they are now or may be hereafter held, to -

It is necessary and should be emphasized that the power to determine dischargeability of a particular claim upon the application of a Bankrupt in the exceptional case, presently resides in the Bankruptcy Court by virtue of a decision of the Supreme Court in Local Loan v. Hunt, 292 U.S. 234 (1934).

The adoption of Section 17 of the Bankruptcy Act as reported by the National Bankruptcy Conference, wherein it stated:

One of the strongest arguments in support of the Bill is, that if the Bill is passed, a single Court, to-wit: the Bankruptcy Court, will be able to pass upon the question of dischargeability of a particular claim and it will be able to develop an expertise in resolving the problem in particular cases. The State Courts' Judges, however capable they may be, do not have enough cases to acquire sufficient experience to enable them to develop this expertise. Moreover, even under the present system in the last analysis, it is the United States Supreme Court, which has the ultimate word on the construction of Section 17 of the Bankruptcy Act. Section 17 makes provisions for the debts to be released by discharge and those which shall be excluded from a discharge. Since this is a Federal Statute, the Federal Courts necessarily have the final word as to the meaning of any terms contained therein.

The United States Constitution in Article VI, Clause 2, provides that:

"This Constitution and the laws of the United States which shall be made in pursuance thereof \*\*\* shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding" is the basic roots wherein the



Doctrine of Federal Pre-emption takes its roots and the Bankruptcy Act is such a pre-emptive Act as is binding upon all States.

The listing of the Respondent herein by the Appellant's spouse in his Bankruptcy schedule (R-14) gave to the Respondent every opportunity to prove its right of title to the security which it claimed and sets forth in its Complaint in the Lower Court, and if in fact there was fraud on the part of the Bankrupt in the Lower Court as to the financing and securing of the home furnishings to the Respondent, the Respondent had not only the opportunity, but the right to have its claim adjudicated in the Federal Bankruptcy Court and to assert the Respondent's right or entitle to the collateral which it now claims.

Phillips v. Krakower, 46 Fed.Rpt.2d 764 (Cir.Ct. of Appeals, 4th Cir., 1931), the Court held that there is ample authority for the proposition that where property is not reachable through Bankruptcy, it can be reached by a creditor under State laws, the Court of Bankruptcy should delay a granting a discharge to the Bankrupt to enable the creditor to receive thereunder in the State Courts. (Lockwood v. Exchange Bank, 190 U.S. 294, 23 Sup.Ct. 751.) The Respondent could, therefore, have prevented the right of the Respondent being precluded from further action in the State Court by an adjudication of the Bankruptcy Court, that the husband would be an essential party, together with the wife, in an action to seek property held

by the entirety or as tenants in common, thereby preserving the purported claim of the Respondent before trial in the State Court by an adjudication in the Bankruptcy Court or in the Second District Court protecting the Respondent and its alleged interest in the home furnishings of the parties. In the prior case, *supra*, the Court held as a matter of law, that the failure of the secured party to join both the husband and wife in a state action, prior to one of the spouses being discharged in Bankruptcy, estopped further state action, in that neither spouse can dispose of any part of the property without the consent of the other and neither has such an interest in the property as can be subjected to the lien of a Judgment for his debts or as can be levied upon and sold under legal process against the parties.

Ades v. Catlan, et ux, 132 Md. 66, 103 At. 94, action wherein the husband and wife were tenants by the entirety and wherein the husband was a Petitioner in Bankruptcy and was discharged from the indebtedness as against him. A creditor attempt to levy upon the property interest of the wife in the tenancy by the entirety, the Bankruptcy Court held an estate of the wife could not be reached during the lifetime of the husband, that there could be no severance of the estate.

Wharton v. Citizens Bank, 223 Mo.App. 236, 15 S.W. 860, (1929), the Court held that where Judgment was obtained against

the wife only, after the discharge of a husband in his voluntary Bankrupt proceedings on a Note signed by both husband and wife, it was held that the lands held by the husband and wife as tenants by the entirety could not, to any extent, be subjected to the payment of the Judgment against the wife during the lifetime of the husband, where the creditor made no attempt to procure a stay of the husband's discharge in Bankruptcy for a time sufficient to enable him to subject the property to his claim. The Court stated:

\*\*If the Appellant had made application to the Federal Court for permission to bring suit against the Bankrupt for the purpose of subjecting the estate by the entirety to the satisfaction of the joint debt and for a stay of proceedings upon the application for discharge until that suit could proceed to Judgment, the permission would have been granted and the Discharge would have been withheld. Then it could have obtained a joint Judgment, which would have been a lien upon the real estate held by the husband and wife as tenants by the entirety. \*\*The husband filed his Petition in Voluntary Bankruptcy, that did not prevent Appellant from proceeding to assert its right, but has lost its right by default.

The Respondent in its Legal Memorandum to the Lower Court attempted to allege the superiority of Article 9 of the Uniform Commercial Code in the instant matter before the Court, upon which a view has been expressed by Professor William E. Hogan in Volume 17, Stanford Law Review, page 840, on "Future

Goods, Floating Liens, and Foolish Creditors", as follows:

At each turn, the Code attempts to improve the position of the secured creditor as against the unsecured creditors and the Trustee in Bankruptcy. This is a sterile undertaking, because the avoiding powers provided by the Bankruptcy Act under the Federal Supremacy clause will prevail over the State created rights of the Article 9 creditor.\*\*\*

In the Matter of Fred Gilmer Saunders, Jr., Bankrupt,  
No. 73-BK-20-R, 365 F.Supp. 1351, (U.S. Dist. Ct., Western District, Virginia, 1973), the Court held that, under the laws of the State of Virginia, property held by the entirety is not subject to the claims of individual creditors of one of the tenants; nor can either spouse acting alone transfer an interest in the property. The Court held, however, that the Petitioner in this case was the holder of Notes signed by both the Bankrupt and his wife, could reach the property held as a tenancy by the entirety were it not for the intervening Bankruptcy, and that since the property was not subject to transfer, released the husband from all provable debts and prevents the Petitioner from obtaining a Judgment against the Bankrupt and his wife on the Notes.

The Court further stated, that this result could be avoided if the Petitioner were able to secure and record a Judgment against the Bankrupt and his wife, since this would create a lien against the property which would not be affected

by a subsequent discharge. The Referee ordered, that the discharge of the Bankrupt be delayed in order that the Petitioner could proceed against the entirety property in State Court.

The Court, therefore, upheld the decision of the Referee in allowing the Bankruptcy to be held up until there was a completed state action as against the husband and wife.

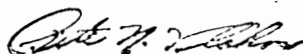
It is, therefore, submitted to the Court that the Respondent by failing to pursue its right to seek remedy in the Bankruptcy Court as against the Bankrupt-spouse of the Appellant prevents the Respondent from asserting its right against the entirety interest of the Appellant and her spouse in the action adjudicated by the Lower Court.

#### CONCLUSION

It is submitted to this Honorable Court, that the Respondent had not only the opportunity but a duty to proceed with its claim against the interest of the husband of the Appellant in the Bankruptcy Court when the Respondent had full knowledge of the listing of its indebtedness in the schedule of the Bankrupt, and that the contention of the Respondent, that it did not proceed in the Bankruptcy Court to establish Respondent's claim as to the property of the husband, in that the Respondent's claim was "invalid" as against the husband should not allow the destruction of the estate of the husband

and wife in their personal property. It is further submitted, that the discharge in Bankruptcy of the husband and the filing of an action in Replevin against the wife only for possession of the family rights of the tenancy in the household furnishings of a husband and wife is contradictory to the "fresh start" theory propounded by innumerable United States Supreme Court decisions in establishing the purposes of the Bankruptcy Act and is contrary to the laws of the State of Utah.

Respectfully submitted,




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PETE N. VLAHOS of VLAHOS & KNOWLTON  
Attorney for Appellant

CERTIFICATE OF MAILING

A copy of the above and foregoing Brief of Appellant was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Respondent, Timothy W. Blackburn, Esq., at Bank of Utah Building, 2605 Washington Boulevard, Ogden, Utah 84401, on this 16 day of July, 1976.

  
Jeannine Stowell, Secretary